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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 272

DETROIT INTERNATIONAL BRIDGE COMPANY,
A MICHIGAN CORPORATION,

Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

MOTION FOR LEAVE TO FILE STATEMENT OF JURISDICTION.

To the Honorable the Judges of the Supreme Court of the United States:

Now comes the Detroit International Bridge Company, appellant in the above entitled cause, and moves the Court for leave to file statement as to the jurisdiction, as required by Rule 12, Paragraph 1 of the United States Supreme Court rules.

Jurisdictional basis and grounds for appeal were set forth by the appellant, Detroit International Bridge Company, in its petition for appeal to the Supreme Court of the United States, as filed with the Chief Justice of the Supreme Court of Michigan. It was the opinion of counsel

for the appellant that this statement of jurisdiction as contained in the petition for appeal sufficiently complied with Rule 12, Paragraph 1 of the United States Supreme Court rules, and that a separate statement of jurisdiction was not necessary. Chief Justice of the Supreme Court of Michigan apparently concurred in this opinion of counsel and the order of appeal was granted.

The Supreme Court of Michigan, in its opinion (267 Michigan—case not yet printed in advance sheets), discussed the Federal constitutional question, that is, whether the annual privilege tax as imposed upon appellant contravened the Commerce Clause of the Federal Constitution. There is clearly and undisputably a Federal question involved.

The clerk of the United States Supreme Court suggested that a separate statement of jurisdiction be filed and that appellant file this, its motion for leave to file such statement of jurisdiction.

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A MICHIGAN CORPORATION,
Appellant,

vs.

CORPORATION TAX APPEAL BOARD OF MICHIGAN.

STATEMENT OF DETROIT INTERNATIONAL BRIDGE COMPANY, APPELLANT, SETTING FORTH THE BASIS ON WHICH THE REVIEW OF THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN IS INVOKED ON APPEAL.

This is an appeal from the judgment entered by the Supreme Court of the State of Michigan, the court of highest jurisdiction in the State of Michigan, entered on July 2, 1934. The application of the Detroit International Bridge Company, the appellant, for leave to appeal to the United States Supreme Court was also filed on July 2, 1934, after the entry of the judgment. The order allowing the appeal was signed and entered by the Chief Justice of the Supreme Court of the State of Michigan on July 2, 1934.

It is the contention of the Detroit International Bridge Company that the United States Supreme Court has jurisdiction to review on appeal the judgment entered by the Supreme Court of the State of Michigan on July 2, 1934, under the provisions of the Judicial Code, Section 237, United States Code Annotated, Title 28, Section 344.

The validity of the Michigan statute in question which Detroit International Bridge Company, appellant, contends impugns Article I, Section 8, Clause 3 of the Constitution of the United States, is Act No. 85 of the Public Acts of 1921 as amended by Act No. 175 of the Public Acts of 1929, a pertinent section of which reads as follows:

> "SEC. 4. Privilege fee, Basis of. Every corporation organized or doing business under the laws of this state, excepting railroad companies and interurban railroad companies, and telephone and telegraph companies, express companies and foreign insurance companies shall, at the time of filing its annual report with the secretary of state of this state, as required by section five of chapter two of part five of act number eighty-four of the public acts of nineteen hundred twenty-one, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of two and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporation franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period."

The appellant, Detroit International Bridge Company, was duly incorporated in 1927 under the laws of the State of Michigan, and at that time paid the Secretary of State for the State of Michigan the franchise or organization fee

for the privilege of *being* a corporation under Act No. 85 of the Public Acts of 1921, Secs. 3 and 3A, as amended by Act No. 33 of the Public Acts of 1927. Distinguished from this organization or franchise fee which is paid for the privilege of bringing into being, for the privilege of being or continuing to exist or to be a corporation, Michigan also imposes an annual privilege fee upon corporations, being Sections 4 and 5 of Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, Sections 4 and 5. As will be pointed out hereinafter, this annual privilege fee is imposed upon domestic and foreign corporations for the privilege of exercising corporate franchises within the State, and for the privilege of doing business in Michigan.

After the Detroit International Bridge Company, the appellant, had commenced to operate this international bridge it contended that it was not subject to the payment of the annual privilege fee for the privilege of doing business in Michigan, because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

This question was raised by the appellant in an appeal involving the constitutionality of the same statute for the year of 1930, *In re Detroit International Bridge Company*, 257 Mich. 52, and an appeal was taken from the Supreme Court of Michigan to the Supreme Court of the United States, *Detroit International Bridge Company* v. *Corporation Tax Appeal Board of Michigan*, 287 U. S. 295. In the appeal to the Supreme Court of the United States counsel for the Corporation Tax Appeal Board contended that

under Article III of the Articles of Association as amended on August 5, 1927, the appellant had the power to engage in business other than the operation of the bridge. The Bridge Company claimed that these other powers were merely incidental to the main purpose of operating this international highway bridge. The United States Supreme Court at page 297 in its decision did not pass upon the constitutionality of the Act, but said:

> "We do not consider whether appellant is engaged in foreign commerce for we are of opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause."

Thereupon, although appellant had been of the opinion that the additional provisions in the amendment to Article III of the Articles of Association of August 5, 1927, were merely incidental to the primary power, nevertheless it did cause said Article III to be amended on May 3, 1933, so as to read as follows:

> "Article III.
>
> "The purpose or purposes of this corporation are as follows:
>
> "To operate the highway bridge, known as the Ambassador Bridge across the Detroit River from Detroit, Michigan, to Sandwich, Province of Ontario, Canada, and the approaches and appurtenances thereto, and to own all or part of said bridge and approaches and appurtenances thereto.
>
> "To maintain and operate said bridge and approaches and appurtenances thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use."

This in substance, is similar to Article III that appeared in the original Articles of Association.

On August 30, 1933, the Detroit International Bridge Company filed its annual report for the year 1933, as is required by Section 82 of Act No. 327 of the Public Acts of 1931, and enclosed therewith its check for $2.00 to cover its filing fee, setting forth in its letter to the Secretary of State that the Articles of Association had been amended on May 3, 1933, as is hereinabove set forth, and that it was now indisputable that the only power the corporation had was to engage in the carrying on of foreign commerce and that it had no power whatsoever under its Articles of Association to do a local business. The appellant, Detroit International Bridge Company, further stated:

> "It is, therefore, the position of the Detroit International Bridge Company that it is not subject to the payment of the annual privilege tax imposed by the laws of the State of Michigan. For the State of Michigan to attempt to impose an annual privilege tax upon the Detroit International Bridge Company for the privilege of doing business, when the only power it has is to engage exclusively in foreign commerce (this being the only business it does engage in), the corporation having no power to engage in local business at all, would be to contravene and violate Article I, Section 8, Clause 3, of the Constitution of the United States."

The Secretary of State on October 26, 1933, held that the appellant was subject to the tax and also that items 5 and 8, consisting of the bridge structure, were not used exclusively in foreign commerce so as to be exempt from the tax, and determined the tax as being thirty-seven hundred sixty-five and 25/100 dollars ($3,765.25), from which determination appellant filed an appeal to the Corporation Tax Appeal Board on November 3, 1933. The Corporation Tax Appeal Board on November 21, 1933, made a like determination.

This case was thereupon appealed to the Supreme Court of the State of Michigan (in a proceeding in the nature of a certiorari proceeding) to review the determination of the Corporation Tax Appeal Board of the State of Michigan. The obligation of the appellant to pay the privilege tax for the year 1933 is before this Court on appeal.

The Detroit International Bridge Company, the appellant, contended that the corporation was not subject to the payment of the annual privilege fee under Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, because that statute imposed an annual tax upon corporations for the privilege of *doing* business (as distinguished from the privilege of *being* or continuing to exist *or to* be a corporation); because the powers of appellant corporation were limited under its corporate charter and pursuant thereto it did and could engage only in the carrying on of this business of foreign commerce, and to impose this annual privilege tax upon it would be to impose a tax upon it for the privilege of engaging exclusively in foreign commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The nature of Act No. 85 of the Public Acts of 1921, of the State of Michigan, the tax statute here in question, has been carefully analyzed and defined by the Supreme Court of Michigan in a case in which the validity of the statute was attacked as being repugnant to certain provisions of the Constitution of the State of Michigan. The Supreme Court of Michigan, in that case, *Union Steam Pump Sales Company* v. *Secretary of State of Michigan*, 216 Mich. 261, held "that it is not a property tax, but is a tax on the franchise to do business as a corporation within the state".

Distinguishing the franchise "to be" a corporation from the franchise of doing business as a corporation, the Michi-

gan Supreme Court, after quoting at length from numerous authorities and text writers, summarized, page 272, saying:

> "These authorities demonstrate beyond cavil that there is a distinction and a well recognized one between the franchise to be a corporation and the franchise to do business as a corporation. *One is the franchise 'to be', the other the franchise 'to do'.* One belongs to the corporators, the other to the corporation. * * * The franchise 'to do' (belonging to the corporation) may follow the franchise 'to be' (belonging to the corporators). But each is a different franchise as the authorities above cited demonstrate and the taxation of one is not the taxation of the other, the sources of revenue are not the same, the subjects of taxation are not the same."

It was concluded by the Court, at page 268, that "The law here under consideration levies a specific tax upon the right, the franchise *to do* business as a corporation."

It was necessary for the Michigan Supreme Court in the *Union Steam Pump Sales Company* case to carefully distinguish between the two different corporate franchise taxes in that the proceeds of the tax were payable to the school fund under the State Constitution if the tax were upon the privilege *to be* a corporation, whereas payments under Act No. 85 of the Public Acts of 1921, here in question, were to be credited to the general fund, and the validity of the act could only be sustained if this was a tax imposed for the privilege of *doing* business as a corporation.

The Detroit International Bridge Company, the appellant, had, upon its organization, paid the organization fee to the State of Michigan for the privilege of *being* a corporation and once this privilege fee is paid upon organization there is no provision under the Michigan laws under which a further tax for this privilege of *being* is imposed. The annual privilege fee, Act No. 85 of the Public Acts of

1921, as amended, on the other hand, as has been determined by the Michigan Supreme Court and as is apparent from the language of the statute, is for the privilege of *doing* business as a corporation. It is for the privilege of doing business for which this tax is imposed upon corporations.

The Detroit International Bridge Company, the appellant, claimed and contended that Act No. 85 of the Public Acts of 1921, as amended by Act No. 175 of the Public Acts of 1929, of the State of Michigan, so far as applied to it, is unconstitutional in that the Act attempted to impose a tax upon it for the privilege of doing business when the only business it did and could do as a corporation under its charter was to engage exclusively in foreign commerce, and that to uphold the validity of the Act as applied to it would be an improper interference with and regulation of foreign commerce by the State of Michigan, and thereby violates the power of Congress, to regulate foreign commerce as provided in Article I, Section 8, Clause 3 of the Constitution of the United States.

These questions were raised in the appeal to the Supreme Court of the State of Michigan in the manner and form required under the practice of said court, and said questions were considered at length by said Supreme Court of the State of Michigan. The contentions of the appellant that the application of the statute as made by the Secretary of State and as applied to it was in violation of the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States were expressly overruled by the judgment and the opinion rendered by said Supreme Court of the State of Michigan (see opinion filed June 4, 1934).

It is the contention of the appellant, Detroit International Bridge Company, that this Court has jurisdiction of this appeal under the provisions of the Judicial Code, Section 237, United States Code Annotated, Title 28, Section 344, that

in the final judgment of the Supreme Court of the State of Michigan, which is the highest court of that state, there has been drawn in question the validity of a statute of the State of Michigan on the ground that it is repugnant to the Constitution of the United States and because the decision of the Supreme Court of Michigan is in favor of the validity of said statute. See *General Oil Company* v. *Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754; *Atlantic Coast Line Railroad Co.* v. *Wharton*, 207 U. S 328, 28 Sup. Ct. 121, 52 L. Ed. 230.

Respectfully submitted,

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